

FEDERAL COURT OF AUSTRALIA

Ibrahim v Minister for Immigration and Border Protection [2018] FCA 2087

Appeal from: *Ibrahim v Minister for Immigration & Anor* [2017] FCCA 1766

File number: NSD 1437 of 2017

Judge: **WIGNEY J**

Date of judgment: 21 December 2018

Catchwords: **MIGRATION** – application for a Partner (Residence) (Class BS) (Subclass 801) visa – where Administrative Appeals Tribunal affirmed the decision of a delegate of the Minister for Immigration and Border Protection to refuse to grant the visa – where Administrative Appeals Tribunal was not satisfied that the applicant met the criteria in cl 801.221 and 801.226 of Schedule 2 to the *Migration Regulations 1994* (Cth) – where Administrative Appeals Tribunal was not satisfied that the applicant met PIC 4020 of Schedule 4 to the *Migration Regulations 1994* (Cth) – where proceedings commenced in the Federal Circuit Court of Australia pursuant to s 476 of the *Migration Act 1958* (Cth) – whether Administrative Appeals Tribunal complied with its statutory requirements under s 359A of the *Migration Act 1958* (Cth) – whether Administrative Appeals Tribunal provided clear particulars of the information to the applicant – where primary judge held that Administrative Appeals Tribunal complied with its statutory requirements under s 359A of the *Migration Act 1958* (Cth) – where primary judge held that Administrative Appeals Tribunal was not required to provide the whole of the content of the communication or the particulars of the whole document – no jurisdictional error found – application dismissed

ADMINISTRATIVE LAW – judicial review – appeal from the Federal Circuit Court of Australia – whether primary judge erred in concluding that Administrative Appeals Tribunal had provided clear particulars of any information as required by s 359AA or s 359A of the *Migration Act 1958* (Cth) – whether primary judge erred in concluding that Administrative Appeals Tribunal had not impermissibly imposed a burden and standard of proof of beyond reasonable doubt on the appellant in respect of the relevant visa criterion – whether Administrative Appeals

Tribunal misunderstood its statutory function – whether Administrative Appeals Tribunal was legally unreasonable – where Administrative Appeals Tribunal was found to have complied with s 359AA or s 359A of the *Migration Act 1958* (Cth) in providing clear particulars of all the information which it considered at the time would be the reason, or part of the reason, for affirming the decision under review – where primary judge was correct to find that Administrative Appeals Tribunal did not contravene s 359AA of the *Migration Act 1958* (Cth) – whether Administrative Appeals Tribunal did not impose a burden and standard of proof of beyond reasonable doubt on the appellant – appeal dismissed

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth)
Migration Act 1958 (Cth) ss 5F, 57, 65, 359AA, 359A, 476
Migration Regulations 1994 (Cth) reg 1.15A, cll 801.221 and 801.226 of Sch 2, PIC 4020 and PIC 4021 of Sch 4

Cases cited: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280
Khan v Minister for Immigration and Citizenship (2011) 192 FCR 173
Minister for Immigration and Citizenship v SZLFX (2009) 238 CLR 507
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Sun v Minister for Immigration and Border Protection (2016) 243 FCR 220
SXRB v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 14
SZBYR v Minister for Immigration and Citizenship (2007) 96 ALD 1; HCA 26
SZKLG v Minister for Immigration and Citizenship (2007) 164 FCR 578
SZNGO v Minister for Immigration and Citizenship (2010) 184 FCR 505
SZTGV v Minister for Immigration and Border Protection (2015) 229 FCR 90
VAF v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 236 FCR 549

Date of hearing: 15 March 2018

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 101

Counsel for the Appellant: Mr D Godwin

Counsel for the Respondents: Mr T Reilly

Solicitor for the
Respondents: Mills Oakley Lawyers

ORDERS

NSD 1437 of 2017

BETWEEN: **MAHMOUD IBRAHIM**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **WIGNEY J**

DATE OF ORDER: **21 DECEMBER 2018**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1 This appeal from a judgment of the Federal **Circuit Court** of Australia raises two issues. The first issue is whether the primary judge erred in concluding that the Administrative Appeals Tribunal had given the appellant, Mr Mahmoud **Ibrahim**, “clear particulars” of any information that it considered “would be the reason, or a part of the reason, for affirming the decision that is under review” as required by s 359AA or s 359A of the *Migration Act 1958* (Cth). The decision under review was a decision of the **delegate** of the first respondent, the **Minister** for Immigration and Border Protection, to refuse to grant Mr Ibrahim a Partner (Residence) (Class BS) (Subclass 801) visa (**Partner Visa**) under s 65 of the Act. The second issue is whether the primary judge erred in concluding that the Tribunal had not impermissibly imposed a burden and standard of proof of beyond reasonable doubt on Mr Ibrahim in respect of the relevant visa criterion when it stated that it was not satisfied that there was “conclusive evidence” of certain facts relevant to that criterion.

2 For the reasons that follow, both those issues are properly resolved adversely to Mr Ibrahim and his appeal must accordingly be dismissed.

MR IBRAHIM’S UNSUCCESSFUL VISA APPLICATION

3 Mr Ibrahim is a citizen of Egypt. He applied for the Partner Visa on 18 June 2013. A relevant criterion for the grant of the Partner Visa was that Mr Ibrahim was the “spouse” of a “sponsoring partner”: cl 801.221(2)(c) of Schedule 2 to the *Migration Regulations 1994* (Cth). Mr Ibrahim’s sponsoring partner was said to be Ms Jana **El-Etri**. Mr Ibrahim supplied information to the **Department** of Immigration and Border Protection in support of his visa application which supported his claim that Ms El-Etri was his spouse.

4 Another relevant criterion for the grant of the Partner Visa was that Mr Ibrahim satisfied public interest criteria (**PIC**) 4020 and 4021. PIC 4020, which was in Schedule 4 of the Regulations, included the criterion that there was no evidence before the Minister that the applicant had given, or had caused to be given, to the Minister, an officer, or the Tribunal, a bogus document or information that was false or misleading in a material particular in relation to the application for the visa.

The Department receives information and invites Mr Ibrahim to respond

5 5 Prior to the delegate deciding Mr Ibrahim's visa application, Ms El-Etri telephoned the Department and advised that she no longer wanted to sponsor Mr Ibrahim and that Mr Ibrahim had provided "fraudulent information to obtain the visa" (Appeal Book AB 157). Ms El-Etri was asked to put that information in writing. She did on the same day. On 28 October 2014, Ms El-Etri sent an email to the Department (AB 159) (the **first email**). Unfortunately, the email is not easy to comprehend. The grammar, spelling and punctuation, or lack thereof, would suggest that English may not be Ms El-Etri's first or main language. For reasons that will become apparent, however, it is important to set out the contents of the email verbatim and in its entirety (AB 159):

I am jana el etri witch you now and think that i am married to mahmoud salem mahmoud ibrahim witch i dont even now how to write his name or i dont now his surname good this person didnt realy marry me he told me i will marry you and give you 30 thousand if you give me the cetizenship so i needed the maney and was happy cuz i am already married in syria and have a husband he put my adress with him but nerver lived with him i have seen him 4 or 5 times only cuz you now that i always out of the country gowing to my husband i have a 3 years girl and 1 boy i got last year his 1 now and a 2 manths baby from my husband in syria and i am even traveling for 6 weeks to my husband on frieday you now and think that mahmoud is divorced from his weif in eygpt that rong he is still with her he is ther now in eygpt his lowyar is not a truthfull lowyer cuz he nows thats me amd mahmoud did it for maney marrige the loweyer made me sighn so they can give me 10 grand first and mahmoud put my name in the electricity and the 5 times i saw him is gust to take photos and he did a little lie party in photos and he told me dont worry imgration wount now about your kids and he told me say your a widow and will get the death paper a frouds one this paper you have is frouds i was never a widow i have been ten years divorced and now married again from my real husband the father of my kids mohamad slaiman my friend told me that i shoud tell yous the truth or ather wize i can get in trouble i dont now this person at all it was a business marriage He told me and lied to me and said it ok in austrlia to do this but when my friend told me this i called up and they told me what to do even the 20 pages that I wroute he paid me for it and told me to do it i started coping it from the internet all lies i hate him and dont wount him any more i wana get read of this ler in my life all i love is my husband please i wana stop the case and get him out of my name and take him to famely court and tell them the truth so i can devorce him witch i was never married to him i am traveling on frieday so i can do something to get my real husband the father of the kids to live with me in austrlia i am sorry and thank you i wish you can get back to me before i travel please i am scared and i gust gave birth and i wana get this lier out of my life I hate him sooooo much thank you

6 6 Section 57 of the Act required the Minister to give particulars of "relevant information" to a visa applicant. "Relevant information" was defined as being information (other than non-discloseable information) that the Minister considered would be the reason, or part of the reason, for refusing to grant a visa. The Minister was also required to ensure, as

far as was reasonably possible, that the applicant understood why the information was relevant to the visa application and invite the applicant to comment on it.

7 7 On 10 June 2015, a delegate wrote to Mr Ibrahim, no doubt with the intention of complying with s 57 of the Act, to advise him of the information which the Department had received from Ms El-Etri and to invite his response. After advising Mr Ibrahim of, amongst other things, the relevant criteria for the grant of a Partner Visa, including PIC 4020, the delegate's letter stated (AB 162-163):

The department received information from your sponsor on 28 October 2014 stating that you entered into a contrived relationship with her for the sole purpose of gaining entry into Australia, that you have never lived together, that you have seen her four or five times only, and that you will give her \$30,000 if you are granted Australian citizenship. Your also [sic] sponsor stated you are not divorced, and that your wife lives in Egypt. Your sponsor further stated that she is not a widow, that she had divorced ten years ago and is still in a relationship with her former husband, that they have two children together, that she is now married again to her former husband, and that she is travelling to Syria to visit her husband and family.

It therefore appears that you have provided false and misleading information to the department regarding your living arrangements and the nature of your relationship with your sponsor.

8 8 Mr Ibrahim was invited to comment on that information.

Mr Ibrahim responds to the information

9 9 Mr Ibrahim responded to the delegate's letter, in some considerable detail, by letter dated 24 June 2015 (AB 166-168). In the letter, Mr Ibrahim said he was shocked to receive the "adverse information" and stated that he denied "the allegation as incorrect". He enclosed with the letter a number of documents (AB 169-212), including two statutory declarations purporting to be from Ms El-Etri dated 7 June 2015 and 19 June 2015 in which Ms El-Etri declared, amongst other things, that she had a "mutual commitment to a shared life as a husband and wife" with Mr Ibrahim (AB 172, AB 175). The letter also enclosed a number of other documents which evidenced, so Mr Ibrahim claimed, his genuine spousal relationship with Ms El-Etri.

10 10 Mr Ibrahim stated in the letter that since he and Ms El-Etri had been married and lived together he had "experienced a lot of problems" but that he had tried to save the marriage. He claimed that his wife had stolen things from him, that she was on medication, that she was angry with him because he was going to visit his ex-wife and children in Egypt and that he

had not given her enough money to visit her children in Turkey (AB 166-167). Mr Ibrahim stated (AB 167):

Originally my wife told me that she is a widow and I accepted her and I totally deny the amount of \$30,000 and her behaviour really made me sick in a way that I was receiving medical treatment and counselling and I never wanted to lodge a domestic violence claim because I thought that Jana and I will be able to continue our relationship because I was previously divorced and I didn't want another divorce in my life. But now I am aware that my wife Jana's behaviour is not normal and I appreciate if I can have a look at her statement mentioned in your invitation to comment.

- 11 11 Mr Ibrahim also said that he had discussed the contents of the delegate's letter with Ms El-Etri, that she "totally denied it" and had "signed some documents to confirm her support for [their] relationship". He submitted that the evidence that he had provided showed that Ms El-Etri had not in fact withdrawn her sponsorship.

The Department receives further information from Ms El-Etri

- 12 12 After Mr Ibrahim had responded to the delegate's letter dated 10 June 2015, but before the delegate had made her decision, it would appear that Ms El-Etri again contacted the Department. While not in the usual form of an email, the communication appears nonetheless to have been some form of electronic message. It appears in a document headed "Job Details Report" dated 2 July 2015. While the document identified Mr Ibrahim by name, it did not specifically refer to Ms El-Etri by name. It is nevertheless readily apparent that the main text in the document was typed or otherwise created by Ms El-Etri. As will be seen, both the Tribunal and the primary judge referred to this communication as being an email sent by Ms El-Etri on 2 July 2015 (the **second email**).
- 13 13 It is again important to set out the main text of the second email verbatim and in its entirety (AB 445):

Name of individual or business=mahmoud salem mahmoud Ibrahim

Age or date of birth=14-10-1978

Nationality=egypt

Address=[REDACTED]

Number of people at residence=2 or 3

Mobile phone=[REDACTED]

Provided information on individual previously=Yes

Details of other individuals=This person that I am reporting the marriage that's

between us is fake marriage we made a deal he marries me to get the citizen ship and that I marry him so he can give me maney but I am already married over seas to the father of my kids and I love him this person all I have meat him is 4 to 5 times since the marriage until now I have taken from him 3000 dolours when he gets his citizen ship he said he will pay me the rest his lowyer and him are very good frouds people I have reported him last year in October so he reseve a letter from the emigration today and he told me to lie and say that I said that cuz I was upset he didn't travel with me I left the country and ran away from him I am in [redacted] he dasnt now my phone number or nathing we talk through emails from 2 weeks ago the emigration sender him a form for me to fill up when I told him no he made my life full of treats and he was treating me to put my story on face book so my Famely and husband nows and he told me I will let you cover your face any where you go so I did it and send ed it to him he told me write nice stuff about me witch I did I don't want this person under my name and I am ready to face the low but him out of my life my kids hate him and I hate him I wana came back home I have been 8 manths out of the country I am asking for your help to put him out of my name please and I getting my papers read to devorce him

Specific information=My marriage to him was a lie for maney and him for the citizen ship he dasnt now anything or never lived with me I gust have my adress ther so yous can beleve and the bank acount and the photos and even I gust got a baby that's 9 manth it's all from my real husband

- 14 14 Importantly, to the extent that the email contained any “relevant information”, as that expression is defined in s 57 of the Act, there is nothing to suggest that the delegate gave Mr Ibrahim particulars of any such information.

The delegate refuses the visa application

- 15 15 The delegate did not accept Mr Ibrahim's response and submission to the information provided by Ms El-Etri. In a decision record dated 30 September 2015, the delegate recorded that she had found that Mr Ibrahim had given false and misleading information and was accordingly not satisfied that he met PIC 4020(1). The key passage in the delegate's decision was as follows (AB 220):

I have reviewed the claims and supporting information you have provided. You have denied the claims made by your sponsor and have provided statutory declarations from you and your sponsor and various forms of documentary evidence in support of your claim that you are in a genuine and continuing relationship with your sponsor. I find that the documentary evidence you have provided does not support your claims regarding your relationship with your sponsor. Although you have provided a statutory declaration made by your sponsor, I have given it little weight as your sponsor makes claims about you living together and doing “*everything together*” when in fact your sponsor has been offshore since 31 October 2014 and has provided no information regarding when she will return to Australia. Your sponsor has also not made any explicit statement denying the information she previously provided to the department regarding the contrived nature of your relationship and her current relationship with her former partner. My initial conclusion that you provided false and misleading information to the department therefore remains unchanged.

16 Having found that Mr Ibrahim did not meet PIC 4020, the delegate accordingly refused to grant the Partner Visa to Mr Ibrahim.

17 The delegate's decision is of some relevance, if only because it is readily apparent that Mr Ibrahim well knew the general nature and substance of the information which Ms El-Etri had provided to the Department, and well knew the general nature of the issues that were likely to arise in his review application in the Tribunal.

THE TRIBUNAL'S REVIEW

18 On 2 October 2015, Mr Ibrahim lodged an application for a review of the delegate's decision with the Tribunal. He was subsequently invited to attend a hearing before the Tribunal to be held on 4 October 2016.

19 On 20 September 2016, Mr Ibrahim furnished voluminous documentary evidence to the Tribunal in support of his review application (AB 269-329). Much of that evidence was directed to refuting and rebutting the information that had been provided to the Department by Ms El-Etri and persuading the Tribunal that his relationship with Ms El-Etri was genuine.

20 In a covering letter which enclosed the documentary evidence, Mr Ibrahim stated, amongst other things, that his relationship with Ms El-Etri "was genuine in all aspects" and that they had "lived together as genuine partners" (AB 269). Mr Ibrahim referred specifically to the information provided by Ms El-Etri in the first email to the effect that they had "entered into a contrived relationship and that [he would] give [Ms El-Etri] \$30,000". He stated that the information was "totally untrue and not genuine". Indeed, Mr Ibrahim directed the Tribunal to a letter dated 29 June 2015, said to have been written by Ms El-Etri, which had been provided to the delegate in response to the delegate's letter dated 10 June 2015, and invited the Tribunal to accept that Ms El-Etri "is suffering psychological problem[s] and her mind is not sound as it can be seen from the information which she provided to the Department on various occasions" (AB 269). He also told the Tribunal that "as from 2015 [he] became a victim of domestic violence". He concluded the letter in the following terms (AB 270):

I ask the Tribunal to give me the opportunity to provide further information or at least put any adverse information to me so that I can honestly reply to it as it is my belief that I have never gone into a contrived marriage and I have not betrayed anybody and I have not given any bad or untruthful information.

I genuinely applied for a partner visa. I have genuinely lived with my partner and our relationship was genuine and declared to others. My behavior with my wife as well

as with the Department was based on honesty and integrity and at no stage have I thought that my wife would betray our marital commitments and I now look forward to the hearing which will be on 4 October 2016.

21 21 The documentary evidence that Mr Ibrahim provided to the Tribunal under cover of his letter dated 20 September 2016 included: documents that appeared to evidence various debts and fines owed by Ms El-Etri, including a sizable debt owed to Centrelink; reports prepared by a psychologist and a social worker referring to Mr Ibrahim's claims concerning domestic violence at the hands of Ms El-Etri; copies of text messages apparently between him and Ms El-Etri and which were said to show the true nature of their relationship; various documents addressed to both Mr Ibrahim and Ms El-Etri at an address in Belfield; copies of some of the documents previously provided to the delegate in answer to the delegate's letter dated 10 June 2015; and copies of photographs of Mr Ibrahim and Ms El-Etri.

The Tribunal hearing and purported compliance with s 359AA of the Act

22 22 Mr Ibrahim appeared at a hearing in the Tribunal on 4 October 2016. Perhaps not surprisingly, the Tribunal asked Mr Ibrahim many questions about his relationship with Ms El-Etri. Mr Ibrahim was specifically asked a series of questions concerning the references in the delegate's decision record which related to the information that Ms El-Etri had provided on 28 October 2014 and Mr Ibrahim's responses thereto. He was also asked some questions concerning the information and evidence that he had provided to the Tribunal under cover of his letter dated 20 September 2016.

23 23 At one point in the hearing, the Tribunal specifically referred to what it called a "formal procedure" which involved putting information to Mr Ibrahim and giving him the opportunity to comment or respond. The transcript of the Tribunal hearing recorded that the Tribunal said the following (AB 504-507):

We have come to a point where im actually going to put some information to you, in a manner I explained earlier. I need to put information to you in a formal way and give you the opportunity to comment or respond to the information.

This is a very formal procedure and I will try and explain it to you.

Under the migration act the tribunal is required to invite you to comment on or respond to certain information, which the tribunal considers would, subject to your commentary response, be the reason or part of the reason for affirming the decision under review.

I will firstly set out particulars of the information. I will then explain to you why the information is relevant and the consequences if the tribunal relies on that information.

I will then invite you to orally comment on or respond to the information.

You may seek additional time to comment on or respond to the information.

If you seek additional time I'll consider your request.

The particulars of the information are:

During the hearing you've told the tribunal you're in a genuine relationship with Ms. Alotri at the time you lodged your application for the partner visa on the 18th June 2013.

This is consistent with the evidence you've provided. The department in June 2013 reviewed the application.

Whereas when Ms. Alotri contacted the department on the 28th October 2014 she advised them the following: She wished to withdraw her sponsorship in relation to application for the partner visa. You offered to give her \$30,000 if she married you so that you could get Australian citizenship.

Your marriage was not real. You and Ms. Alotri at no stage lived together at the same address. You and Ms. Alotri only met on 4 to 5 occasions and you used these occasions to take photographs of the two of you together. Ms. Alotri remained in the relationship with her ex-husband and has three children with him. A girl aged 3 years, a boy aged 1 and a 2 month old baby. You're still in a relationship with your ex-wife in Egypt.

Now, this information is relevant Mr. Ibrahim, because it appears to be inconsistent with evidence to the tribunal that you were in a genuine relationship with Ms. Alotri at the time you lodged your application for the partner visa in October 2013.

If the tribunal relies on the information provided by Ms. Alotri it may find that you provided the department of immigration and border protection with false or misleading information about your relationship with your relationship with Ms. Alotri in October 2013.

Now, the second issue is as follows: In June 2015 you provided the department with statutory [sic] declarations and other evidence from Ms. Alotri in which she states that you are in a genuine relationship. This is consistent with information contained in the letter from you to the department dated 24 June 2015. Whereas Ms. Alotri contacted the department of immigration and border protection on 2 July 2015 and advised them the following: You're [sic] marriage to her is a fake marriage. She married you for money and you have so far paid her \$3,000 with the agreement more will be paid if you got Australian citizenship.

She is already married and has a 9 month year [sic] old baby with her real husband. She is not in Australia. You contacted her overseas and told her you had received a letter from the department of immigration and border protection and you told her to lie and say she was upset with you because you did not travel with her when she left Australia. She filled out the document you wanted from her because of the threats you made to her. Whilst you may have put her name and address on some bank accounts and things, you never lived together in Australia. The inconsistency in the evidence suggests that you and Ms. Alotri were at no stage in a genuine relationship and she has said the information in the statements and declarations she made in June 2015 were not truthful.

Interpreter asking

Sorry Mr. member what's after June 2015

...

She said the declaration and the statements she made in June 2015 were not truthful

This information is relevant because it appears to be inconsistent with your evidence to the tribunal that you were in a genuine relationship with Ms. Alotri at the time you lodged your application for a partner visa in October 2013.

If the tribunal relies on the information provided by Ms. Alotri it may find that you provided the department of immigration and border protection with false or misleading information about your relationship with Ms. Alotri in October 2013.

24 24 Mr Ibrahim indicated that he did not want further time to respond and that he wanted to respond straight away. He gave the following evidence (AB 507-509):

The issue of the inconsistency in the evidence is from her end, not from my end. I did not provide anything that's wrong. She was the one who said that she's a widow when she wasn't.

I did not provide any wrong information to the department and the fact that she said that I sent her a threatening message, how can I threaten her when she's outside of Australia? She had already stolen a passport and had done all of these things.

There is no way that I can threaten her. In the email she lied to me and she told me that she did not send any letters, and she said I will be sending the correct information. And she did provide the correct information.

The letter I'm referring to when she said she did not send anything, I'm referring to the letter of the 28th of October 2014.

In regards to us not living with each other, how can that be when there are so many bills and all the letters, her letters, were coming to my home address. We have all the photos and all the messages between us, what does that mean? Does that mean I had lost my memory? Or how can she say that she only saw me on few occasions?

In regards to the inconsistent information, who was the one who provided inconsistent information?

...

You believe the things that you want, but on the other hand, she is lying with other things. Where is the false information that I provided?

All the information that I provided from the beginning of our marriage has been consistent.

The discrepancy in her evidence can be because of her psychological status, character, or brain, but I do assure you that 90% of what she says is false; is a lie.

In regards to the \$3,000, how could I have given her that and finalised all the payment, if the payment is supposed to be \$30,000?

So what I want to say is she is abnormal. You need to have a look at her letters and how she deals with companies and other parties. She's really not credible. I only want you to know who you are dealing with. The things that I heard are things that I have not heard before, and I don't know why they were said. When she wants money

she can say anything. I hope that she can have some treatment and go back to being well.

25 25 Mr Ibrahim also referred to further documentary evidence he could provide which would show that he lived with Ms El-Etri. The Tribunal gave Mr Ibrahim 14 days in which to provide that evidence.

26 26 Mr Ibrahim in due course provided that further evidence under cover of a letter dated 11 October 2016 (AB 330). The further documentary evidence included: a letter from someone who appeared to be a neighbour of the Belfield address that Mr Ibrahim said he lived at with Ms El-Etri; more photographs; bank statements evidencing a joint bank account in the names of Mr Ibrahim and Ms El-Etri; and various other documents (AB 331-414).

The Tribunal affirms the decision to refuse to grant the Partner Visa to Mr Ibrahim

27 27 The Tribunal affirmed the delegate's decision to refuse to grant Mr Ibrahim the Partner Visa. In its Statement of Decision and **Reasons**, the Tribunal gave two main reasons for affirming the delegate's decision: first, it was not satisfied that, at the time of the decision, Mr Ibrahim and Ms El-Etri were or are in a spousal relationship and, therefore, Mr Ibrahim did not meet the criterion in cl 801.221(2)(c) of Schedule 2 to the Regulations; and second, Mr Ibrahim had given information to the Department and the Tribunal in relation to his relationship with Ms El-Etri which was false and misleading. Mr Ibrahim accordingly did not meet PIC 4020.

28 28 The Tribunal gave relatively detailed reasons explaining how it had arrived at those two findings.

29 29 The Tribunal first explained that it did not find Mr Ibrahim to be a credible witness: Reasons at [49]. Important, in that regard, was that the Tribunal found that Mr Ibrahim's claim that he had suffered domestic violence from Ms El-Etri in 2015 was inconsistent with the fact that Ms El-Etri departed from Australia in October 2014 and has not returned: Reasons at [50]. The Tribunal noted that there was no suggestion that the domestic violence consisted of abuse or threats made to Mr Ibrahim over the telephone or by other electronic means. The Tribunal also relied on what it considered to be an inconsistency between Mr Ibrahim's evidence concerning Ms El-Etri's alleged dependency on a particular type of prescription drug and a reference in the report of the social worker to a different type of drug. The Tribunal was apparently unimpressed with Mr Ibrahim's explanation of that inconsistency: Reasons at [51].

30 30 The Tribunal then turned its attention to what was said to be the s 359AA disclosure of information and Mr Ibrahim's response to it. The Tribunal found that Mr Ibrahim's response did not "adequately explain why the Tribunal should disregard information regarding the contrived nature of the parties' relationship" that was provided by the first and second emails: Reasons at [55]. The Tribunal noted, in that context, that all of the information that had been supplied to the Department in support of Mr Ibrahim's visa application had been supplied by him or upon his behalf: Reasons at [56]. It also noted that Ms El-Etri had retracted her previous statements: Reasons at [57].

31 31 In relation to the information in the second email to the effect that Mr Ibrahim had threatened Ms El-Etri in June or July 2015, the Tribunal noted that Mr Ibrahim's response was that he could not have threatened Ms El-Etri at that time because she was overseas. The Tribunal observed, however, that it could "see no reason why threats could not have potentially been made" to Ms El-Etri through "electronic mediums": Reasons at [58].

32 32 The Tribunal referred to the documentary evidence that had been provided by Mr Ibrahim which suggested that Mr Ibrahim and Ms El-Etri had resided together at the Belfield address. The Tribunal reasoned, however, that the documentary evidence did not "o[f] itself [provide] a reason for the Tribunal to disregard Ms El-Etri's claims [that] the parties were in a contrived relationship": Reasons at [60]. The Tribunal noted, in that context, that in the second email "Ms El-Etri told the Department her name was put onto a rental lease and a bank account, along with Mr Ibrahim's, but that they had at no stage actually lived together": Reasons at [60]. The Tribunal found, however, that it was not satisfied that Mr Ibrahim had "provided a coherent reason why [Ms El-Etri's] claim [that] they had at no stage actually lived together should be disregarded": Reasons at [60].

33 33 The Tribunal specifically addressed two other aspects of Mr Ibrahim's response to the disclosure of the information in the first and second emails. First, the Tribunal referred to Mr Ibrahim's reliance on the fact that Ms El-Etri had said that she had only been paid part of the money that Mr Ibrahim said that he would pay. The Tribunal reasoned, however, that the fact that only part of the money had been paid did not discredit Ms El-Etri's "advice to the Department that the parties were in a contrived relationship": Reasons at [61]. Second, the Tribunal referred to Mr Ibrahim's contention that the discrepancies in Ms El-Etri's evidence about the relationship could be accounted for by Ms El-Etri's psychological problems. The Tribunal noted, however, that Mr Ibrahim had "produced no medical evidence to corroborate

his claims [that Ms El-Etri] suffers from some form of psychological problem, brain abnormality or drug dependency”: Reasons at [62].

34 34 The Tribunal ultimately did not accept Mr Ibrahim’s contention that it should disregard the information contained in Ms El-Etri’s emails: Reasons at [63]. It concluded (Reasons at [64]):

When considered as a whole, the Tribunal has serious concern with regard to the weight that can be given to information provided by Mr Ibrahim in his visa application and in subsequent statements he has provided to the Department and this Tribunal and in the oral evidence he gave during the hearing. The Tribunal does not consider Mr Ibrahim to be a credible witness and finds he was willing to provide false information to both the Department and the Tribunal in order to support his application.

35 35 The Tribunal next addressed the criterion in cl 801.221(2)(c) of Schedule 2 to the Regulations and the question whether Mr Ibrahim and Ms El-Etri were in a spousal relationship. In that context, the Tribunal considered and made findings concerning the evidence and information provided by Mr Ibrahim in respect of the financial aspects of his relationship with Ms El-Etri, the evidence which suggested that Mr Ibrahim and Ms El-Etri resided together at the Belfield address, the “social aspects” of the claimed relationship and the evidence as to whether Mr Ibrahim and Ms El-Etri had a commitment to each other. It is, in light of the relatively narrow grounds of appeal, unnecessary to consider the Tribunal’s reasoning in relation to those matters in great detail. It suffices to make the following points.

36 36 First, in relation to Mr Ibrahim’s claim that he lived with Ms El-Etri at the Belfield address, the Tribunal noted again that, in her emails, Ms El-Etri had “acknowledged she agreed to provide the Punchbowl Road, Belfield address to the bank and other instrumentalities, for the purpose of misrepresenting her and Mr Ibrahim’s relationship circumstances”: Reasons [74]. The Tribunal reasoned that it preferred “the evidence provided by Ms El-Etri in her emails ... over that provided by Mr Ibrahim with regard to this issue”: Reasons at [74].

37 37 Second, the Tribunal concluded, in relation to Mr Ibrahim’s claim that he resided with Ms El-Etri at the Belfield address, that it was not satisfied that there was “conclusive evidence” before it that Mr Ibrahim and Ms El-Etri had “established a household together”: Reasons at [76]. As will be seen, this was one of the conclusions that Mr Ibrahim contended revealed that the Tribunal had effectively imposed upon him a burden and standard of proof of beyond reasonable doubt. The other one was the Tribunal’s conclusion that it was not

satisfied that there was “conclusive evidence” that Mr Ibrahim and Ms El-Etri were in an exclusive relationship with each other: Reasons at [86].

38 38 Third, in relation to Mr Ibrahim’s claim that he was in an exclusive and genuine relationship with Ms El-Etri, the Tribunal referred to statutory declarations of three witnesses that Mr Ibrahim had supplied. The Tribunal said, in relation to that evidence, that it was “not satisfied [that] it can prefer this evidence over that provided by Ms El-Etri”: Reasons at [80].

39 39 Finally, the Tribunal addressed PIC 4020. It concluded that Mr Ibrahim did not meet that criterion because he had provided false and misleading information to the Department concerning his relationship with Ms El-Etri. The Tribunal reasoned as follows (Reasons at [97]):

The information which the Department claimed to have been false or misleading were the statements made by the applicant in June 2013, in the 47SP form he submitted with the visa application, claiming the parties were in a genuine and continuing relationship. Along with the visa application, Mr Ibrahim provided written statements from Ms El-Etri in which she attested to the genuine nature of the parties’ relationship. The Tribunal accepts her subsequent evidence that the parties’ relationship was contrived and that she was at no stage in a genuine and continuing relationship with Mr Ibrahim. The [T]ribunal finds Mr Ibrahim and Ms El-Etri were in a contrived relationship. It follows therefore that information contained in Ms El-Etri’s written statements, which Mr Ibrahim provided with the visa application were false and misleading.

40 40 The Tribunal’s reference to Ms El-Etri’s “subsequent evidence” is apparently a reference to the first and second emails.

41 41 It should also be noted that the Tribunal found that PIC 4020 should not be waived.

42 42 The Tribunal’s ultimate conclusion was that Mr Ibrahim did not meet the criteria in cll 801.221 and 801.226 of Schedule 2 to the Regulations and that the delegate’s decision should accordingly be affirmed.

THE CIRCUIT COURT PROCEEDINGS AND JUDGMENT

43 43 Mr Ibrahim commenced proceedings in the Circuit Court pursuant to s 476 of the Act seeking an order that the Tribunal’s decision be quashed and that a writ of mandamus be issued directing the Tribunal to determine his review application according to law. His further amended application contained two grounds upon which the Tribunal’s decision was challenged.

44 44 The first ground was that the Tribunal failed to comply with s 359A(1)(a) of the Act. It was contended that while the Tribunal put some parts of the emails to Mr Ibrahim at the hearing, purportedly pursuant s 359AA of the Act, other parts of the emails were not disclosed. It followed, so it was said, that there had been no compliance with s 359A. The particulars of the alleged non-compliance with s 359AA or s 359A essentially comprised a list of extracts from the first and second emails which Mr Ibrahim contended the Tribunal did not orally give to him at the hearing.

45 45 The second ground was that the Tribunal's exercise of power miscarried as it required Mr Ibrahim to provide "conclusive evidence" to establish that he was the spouse of Ms El-Etri and in so doing "the Tribunal misunderstood its Statutory function and its decision was legally unreasonable".

46 46 The primary judge rejected both of Mr Ibrahim's grounds of challenge to the Tribunal's decision and dismissed his application with costs.

47 47 It would appear that Mr Ibrahim's case before the Circuit Court in relation to ground 1 was that he should have been provided with copies of the emails in their entirety. That contention was rejected by the primary judge.

48 48 The primary judge held that s 359AA of the Act provided only that the Tribunal must supply clear particulars of information that it considered would be the reason, or part of the reason, for affirming the decision under review. It does not require "particulars of the whole document or all information that could or might undermine, negate or contradict the applicant's claims". Rather, it was "for the Tribunal to consider what information would be the reason or part of the reason for affirming the decision under review and that must be objectively considered in light of information that would undermine, negate or contradict the applicant's claims": Judgment at [37]. Similarly, the primary judge considered that "only clear particulars of the information objectively considered by the Tribunal to meet the test that it would be the reason or part of the reason for affirming the decision under review is to be provided to the applicant": Judgment at [43].

49 49 It is, with respect, not entirely clear what the primary judge meant when he said that the Tribunal only had to disclose information which it "objectively considered" met the "test" in s 359A. Nevertheless, his Honour appeared to conclude that the Tribunal "met that objective consideration by the clear particulars" that had been provided: Judgment at [43].

The basis of that conclusion was also not clearly or coherently explained, though it would seem that his Honour was of the view that the relevant information which met the “test” was information that Mr Ibrahim was not in a genuine relationship and that the relationship was contrived or “fake”: see Judgment at [42], [45] and [47]. His Honour appeared to reason that the Tribunal met its obligations under s 359AA or s 359A if it disclosed particulars of that information; it did not need to disclose “[t]he whole of the email or full particulars of all [of] the email”: Judgment at [43], [46]. His Honour repeatedly exhorted that the information that was disclosed by the Tribunal comprised the only “clear particulars” that the Tribunal needed to disclose to satisfy s 359AA, apparently on the basis that the falsity of the relationship was “up in lights” from those particulars: Judgment at [47].

50 50 It should also be noted that the primary judge rejected a submission made on Mr Ibrahim’s behalf to the effect that the Tribunal was required to disclose information in the first email which suggested that Mr Ibrahim’s lawyer was involved in the provision of money to Ms El-Etri in return for her assistance in providing false information about her relationship with Mr Ibrahim. His Honour concluded that the information in the first email about that issue was “not information of itself that undermines, contradicts or negates [the] applicant’s claims”: Judgment at [41]. That rather emphatic and unqualified conclusion was not further explained and, at first blush at least, appears rather difficult to accept.

51 51 The primary judge also rejected Mr Ibrahim’s submission that the Tribunal was required to disclose information in the two emails concerning the amount of money that Ms El-Etri claimed that Mr Ibrahim had promised to pay her. That requirement was said to have arisen because the information in the two emails was inconsistent. The point that was apparently being made was that the first email referred to a preliminary or first payment of \$10,000, whereas the second email referred to a first payment of \$3,000. It was contended that Mr Ibrahim should have been provided with that information because it would have allowed him to submit that the information which had been provided by Ms El-Etri was not reliable or credible. It would appear that his Honour misunderstood that argument because he held that the “alleged inconsistency in relation to [the] payments was apparent on the particulars that were provided”: Judgment at [44]. That was incorrect. The primary judge did, however, reason more generally that Mr Ibrahim did “take issue with the credibility of the information” which Ms El-Etri had provided to the Department.

52 As for ground 2, the primary judge rejected the contention that, by using the word “conclusive” in [76] and [86] of its reasons, the Tribunal introduced a requirement for the applicant to prove beyond reasonable doubt that the relevant visa criteria were met: Judgment at [52]. His Honour reasoned (Judgment at [51]):

The Tribunal’s reasons are not to be read with a keen eye for error. I do not accept that the Tribunal was introducing any standard of proof or onus upon the applicant. On a fair reading of the Tribunal’s reasons as a whole, it is apparent that the Tribunal correctly understood the statutory requirements in relation to whether the applicant was the spouse of the sponsoring partner.

53 His Honour concluded that Mr Ibrahim had not demonstrated that the Tribunal made any jurisdictional error and dismissed the application.

APPEAL GROUNDS AND SUBMISSION

54 There are two grounds of appeal. They largely mirror the grounds of review in the court below.

55 The first ground is that the primary judge erred in not finding that the Tribunal had failed to comply with s 359A of the Act.

56 The second ground is that the primary judge erred in not finding that the Tribunal’s exercise of power miscarried because it required Mr Ibrahim to provide “conclusive evidence” to establish that he was the spouse of his sponsor, Ms El-Etri. It was contended that, in doing so, the Tribunal misunderstood its statutory function and its decision was legally unreasonable.

57 In relation to the first ground, Mr Ibrahim contended that insufficient details of the emails were disclosed to him. He submitted that, in order to meaningfully respond to the “s 359AA invitation”, it was necessary for him to see the whole of the contents of each document as all of the information in it was intrinsically adverse to him given that the statutory definition of “spouse” required the Tribunal to consider the whole of the circumstances of the relationship. In that regard, Mr Ibrahim relied on the fact that reg 1.15A of the Regulations provided, in effect, that the Tribunal (standing in the shoes of the Minister) was required to consider “all of the circumstances of the relationship”.

58 Alternatively, Mr Ibrahim contended that the Tribunal was required to disclose to him two parts of the emails which were not disclosed to him: first, parts of the emails which revealed inconsistencies in Ms El-Etri’s assertions; and second, parts of one of the emails

which implicated his lawyer. In Mr Ibrahim's submission, the first category of information should have been disclosed to him so that he was able to make submissions to the effect that Ms El-Etri's assertions were unreliable and should not be believed, and the second category of information should have been disclosed to him so that he was able to provide evidence that refuted or responded to it.

Mr Ibrahim also contended that the Tribunal relied on portions of the emails that had not been disclosed to him. Mr Ibrahim identified two categories of information in that regard.

First, the Tribunal specifically referred, in [74] of its reasons, to the fact that Ms El-Etri had acknowledged that she had agreed to provide the Belfield address to the bank and "other instrumentalities". Mr Ibrahim submitted that the Tribunal did not disclose to him that Ms El-Etri had said that she had agreed for her name to be provided to instrumentalities.

Second, in Mr Ibrahim's submission, parts of the Tribunal's reasons disclose that the Tribunal in fact relied on the emails in their entirety. For example, in [80] of its reasons, the Tribunal referred to the evidence provided by Ms El-Etri. Similarly, in [97], the Tribunal referred to Ms El-Etri's "subsequent evidence"; an apparent reference to the two emails in their entirety. The Tribunal's reasoning in [85], which referred to Ms El-Etri advising the Department that her relationship with Mr Ibrahim was contrived, also revealed, in Mr Ibrahim's submission, that the Tribunal was relying on the effect of the whole of the emails.

Finally, in relation to the first ground, Mr Ibrahim submitted that the Tribunal was required to disclose any information in the emails which was on its face adverse to him. Information of that sort was required to be disclosed even though the Tribunal's reasons may not have suggested that the Tribunal expressly relied on it.

GROUND ONE – COMPLIANCE WITH SECTIONS 359AA OR 359A

Section 359AA(1) of the Act provides as follows:

- (1) If an applicant is appearing before the Tribunal because of an invitation under section 360:
 - (a) the Tribunal may orally give to the applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) if the Tribunal does so—the Tribunal must:

- (i) ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to the review, and the consequences of the information being relied on in affirming the decision that is under review; and
- (ii) orally invite the applicant to comment on or respond to the information; and
- (iii) advise the applicant that he or she may seek additional time to comment on or respond to the information; and
- (iv) if the applicant seeks additional time to comment on or respond to the information—adjourn the review, if the Tribunal considers that the applicant reasonably needs additional time to comment on or respond to the information.

64 64 Section 359A(1)-(3) of the Act provides as follows:

- (1) Subject to subsections (2) and (3), the Tribunal must:
 - (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
 - (c) invite the applicant to comment on or respond to it.
- (2) The information and invitation must be given to the applicant:
 - (a) except where paragraph (b) applies—by one of the methods specified in section 379A; or
 - (b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.
- (3) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.

65 65 The Tribunal gave Mr Ibrahim particulars of information that was contained in the two emails that Ms El-Etri sent to the Department at the hearing pursuant to s 359AA(1) of the Act. If those particulars were sufficient to satisfy the Tribunal's obligations under s 359AA, the Tribunal was not, by reason of s 359A(3), required to give Mr Ibrahim any further particulars under s 359A(1). The critical question, then, is whether the particulars of the information contained in the two emails that the Tribunal orally gave to Mr Ibrahim at the hearing were sufficient to comply with s 359AA. Did the Tribunal give Mr Ibrahim clear particulars of all the information contained in the emails which it considered would be the

reason, or part of the reason, for affirming the delegate's decision to refuse to grant the Partner Visa to him?

To answer that question, it is necessary to have regard to the principles that apply in determining what constitutes "clear particulars" of information that the Tribunal "considers would be the reason, or part of the reason, for affirming the decision that is under review", for the purpose of ss 359AA and 359A, or cognate provisions in other parts of the Act. Those principles have been considered in a number of cases. The primary judge's statements of principle in relation to ss 359AA and 359A were, with respect, far from pellucid. Regrettably, his Honour also did not refer to any of the relevant authorities.

Relevant principles

The relevant principles in relation to ss 359AA, 359A, or cognate provisions in other parts of the Act, may be summarised as follows.

First, the particulars that must be provided are particulars of "information"; the obligation to give particulars does not extend to particulars of "subjective thought processes or determinations" or the "existence of doubts, inconsistencies or the absence of evidence": *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 at [23]-[28]; *SZBYR v Minister for Immigration and Citizenship* (2007) 96 ALD 1; HCA 26 at [18].

Second, the information must be information that "would be the reason, or part of the reason, for affirming the decision that is under review": *SZBYR* at [17]. That criterion directs attention not to the prospective reasoning process of the Tribunal, or the Tribunal's published reasons, but rather to the criteria for the making of the decision in the first place: *SZBYR* at [17]. The "use of the future conditional tense (would be) rather than the indicative strongly suggests that the operation of [the section] is to be determined in advance – and independently – of the [T]ribunal's particular reasoning on the facts of the case": *SZBYR* at [17].

Third, for the requirement or obligation in s 359AA to be engaged, the information in question should in its terms involve a "rejection, denial or undermining" of the review applicant's claims relevant to the visa criteria in question: *SZBYR* at [17]; *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507 at [22].

71 Fourth, the relevant criterion depends on the Tribunal's "consideration", that is, its opinion, that certain information would be the reason, or part of the reason, for affirming the decision under review: *SZLFX* at [24]; *SZKLG v Minister for Immigration and Citizenship* (2007) 164 FCR 578 at [33]. There must be some evidence or necessary inference that the Tribunal "considered" or had an opinion about the information in question before it could be said that it was required to give particulars of that information for the purposes of the section.

72 The "attitude" or opinion of the Tribunal in relation to the information can be gleaned or inferred from its published reasons: *cf. SZLFX* at [26]. That is not to say, however, that the published reasons will necessarily be conclusive in respect of the issue. As "the obligation arises during the course of the review, it is not sufficient, in order to exclude it, merely to point to the reasoning disclosed in the decision after the review has been conducted and completed": *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173 at [45] (Buchanan J, with whom Yates J agreed).

73 Fifth, the section speaks of information which "would", not which "could" or "might", be the reason, or part of the reason, for affirming the decision under review: *SZLFX* at [25].

74 Sixth, the requirement to give information may not extend to a requirement to disclose the entirety of any document in which the information is contained; how much, if any, of the surrounding context in which the information appears must also be disclosed will depend upon the facts and circumstances of the particular case: *SZNGO v Minister for Immigration and Citizenship* (2010) 184 FCR 505 at [23]; referred to with approval in *SZTGV v Minister for Immigration and Border Protection* (2015) 229 FCR 90 at [27], [32]. It must also follow that the requirement does not extend to giving the applicant a copy of the document in which the relevant information is contained: *SXRB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 14 at [9].

75 Seventh, it is readily apparent that the purpose of the disclosure required by s 359AA is to enable the applicant to "comment on or respond to the information": s 359AA(1)(b)(ii), (iii) and (iv). It must follow that the particulars of the information that are provided must be sufficient to enable the applicant to "meaningfully" respond or comment: *SZNGO* at [23], [27].

Application of the principles to the facts and circumstances of the case

76 76 The starting point for the consideration of what information the Tribunal would consider to be the reason, or part of the reason, for affirming the decision under review is the relevant criteria for the grant of the Partner Visa in Mr Ibrahim's case. The relevant criteria were the criteria in cll 801.221 and 801.226 of Schedule 2 to the Regulations: specifically, whether Mr Ibrahim was the spouse of his sponsor, Ms El-Etri, and whether he had provided false or misleading information to the Department or the Tribunal in relation to that question. Section 5F of the Act provides that a person is the spouse of another person if the two persons are in a "married relationship" and that persons are in a married relationship if, amongst other things, they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship between them is genuine and continuing, and they live together or do not live separately and apart on a permanent basis.

77 77 It follows that any information contained in the two emails sent to the Department by Ms El-Etri would constitute information that would be the reason, or part of the reason, for affirming the delegate's decision to refuse to grant the Partner Visa to Mr Ibrahim if the Tribunal considered that the information would in some way amount to a rejection, denial or undermining of Mr Ibrahim's claim that he was Ms El-Etri's spouse, and that the information which he had provided to the Department to that effect was not in any way false or misleading.

78 78 There could be no doubt that the emails contained such information. The question is, however, whether the Tribunal gave Mr Ibrahim clear particulars of all the information that fell into that category. Is there any evidence or necessary inference that during the review the Tribunal considered that any information which was not included in the particulars it gave to Mr Ibrahim at the hearing would have been a reason, or part of the reason, for affirming the refusal to grant the visa to Mr Ibrahim?

79 79 The first point to note is that there is no basis to conclude or infer that the Tribunal considered that all of the information in the two emails was information which would be the reason, or part of the reason, for affirming the decision under review. The Tribunal was accordingly not required to provide all of the information in the emails to Mr Ibrahim. Mr Ibrahim's submission to the contrary is rejected.

80 80 The evidence concerning what occurred during the hearing, and the inferences able to be drawn from the Tribunal's reasons, suggest that the Tribunal considered that some of the

information in the two emails would be the reason, or part of the reason, for finding that Mr Ibrahim did not satisfy the relevant visa criteria, and that the decision under review should therefore be affirmed. The information that met that description was, in substance or in summary, information that: Ms El-Etri wanted to withdraw her sponsorship of Mr Ibrahim; Ms El-Etri said that her marriage to Mr Ibrahim was not real or was “fake”; Ms El-Etri never lived with Mr Ibrahim at the same address; Ms El-Etri remained in a relationship with her ex-husband with whom she had children; Mr Ibrahim remained in a relationship with his ex-wife in Egypt; Ms El-Etri married Mr Ibrahim in return for a payment of money; Ms El-Etri was no longer in Australia; Mr Ibrahim contacted Ms El-Etri in June or July 2015, after the delegate had written to Mr Ibrahim after the first email, and told Ms El-Etri to lie to the Department about why she sent the first email; Ms El-Etri completed documents that Mr Ibrahim wanted her to complete because of threats made by Mr Ibrahim; and that while Mr Ibrahim had put Ms El-Etri’s name on some bank accounts and “other things”, they had never lived together in Australia.

81 81 It is clear that the Tribunal considered that the information in the emails concerning those matters would be the reason, or part of the reason, for finding that Ms El-Etri was not Mr Ibrahim’s spouse and that the information Mr Ibrahim had provided to suggest that Ms El-Etri was his spouse was false and misleading.

82 82 The information in the two emails essentially went no further than the summary that has just been given. While there may have been some more minor additional detail about certain matters, that further detail was of little, if any, significance to Mr Ibrahim’s application for the Partner Visa. More importantly, there was and is no basis to conclude that the Tribunal considered that any additional information in the emails would of itself be information which would be the reason, or part of the reason, for affirming the decision under review.

83 83 For example, while the first email included information to the effect that Mr Ibrahim’s lawyer was not a truthful lawyer and knew that Ms El-Etri was marrying Mr Ibrahim for money, there is nothing to suggest that the Tribunal considered that such information would be the reason, or part of the reason, for affirming the decision under review. The apparent involvement of the lawyer did not, of itself, add anything of significance to the information that Ms El-Etri did not consider that the marriage was real and that she only married

Mr Ibrahim for the money. It follows that the fact that Mr Ibrahim, if advised of that additional information, could have obtained evidence to refute it, is not to the point.

84 84 Similarly, the fact that the first email included information that the lawyer made Ms El-Etri sign documents so he or Mr Ibrahim could give her \$10,000 “first” was of no significance. There was nothing to suggest that the Tribunal considered that additional piece of information to be the reason, or part of the reason, for affirming the delegate’s decision. It did not add anything to the information, which was disclosed, to the effect that the marriage was fake and that Ms El-Etri only married for the money that she was to be given. Mr Ibrahim contended that if that additional information was disclosed he could have made submissions about the unreliability of Ms El-Etri based on the supposed inconsistency between this information and information in the second email about a payment of \$3,000. It is by no means clear that there was in fact any such inconsistency, as Ms El-Etri did not appear to state in the first email that she in fact received \$10,000. In any event, the fact remains that there is nothing to suggest that the additional information about the promised payment of \$10,000 was information which the Tribunal considered would be the reason, or part of the reason, for affirming the decision.

85 85 The same point can be made concerning the other specific piece of information that Mr Ibrahim claims he was not given by the Tribunal. That information was that Ms El-Etri had allowed her name to be provided not just to the bank, but also to “instrumentalities”. That additional information was of no particular moment in circumstances where the Tribunal had disclosed to Mr Ibrahim that Ms El-Etri had said that he had put her name and address on some bank accounts and “other things”. The reference to “other things” was sufficiently broad to include instrumentalities. In any event, the main point, or rather the substance of the information, was that Mr Ibrahim and Ms El-Etri never lived together, even if their names did appear on bank accounts and on bills from instrumentalities.

86 86 It should also be noted in this context that Mr Ibrahim’s contention that the Tribunal was required to disclose the emails in their entirety because, by reason of reg 1.15A of the Regulations, he was required to consider the “whole of the circumstances of the relationship” between Mr Ibrahim and Ms El-Etri, has no merit. While the Tribunal was required to consider the whole relationship, it does not follow that every piece of information in the emails, including any additional information which was not disclosed, was considered by the Tribunal to be the reason, or part of the reason, for affirming the decision that is under review.

87 87 The second point is that, unlike the circumstances in, for example, *SZINKO* and *Khan*, the facts and circumstances of this case were not such that the Tribunal was required to disclose the full context in which the information it did disclose appeared or was recorded. Indeed, disclosure of the entire emails, or any further information that may have been contained in them, would not have relevantly or materially assisted Mr Ibrahim to respond or comment on the information in a meaningful way. The emails were in many respects difficult to understand because of the poor grammar and spelling employed in them. The Tribunal's distillation of the information in the emails which it considered would be the reason, or part of the reason, for affirming the refusal to grant the visa to Mr Ibrahim was of more assistance. In any event, the more important point is that there is no indication that the Tribunal considered that any contextual information, or anything about the context in which the information appeared, would be the reason, or part of the reason, for affirming the decision under review.

88 88 The third point is that the Tribunal's statements in its reasons to the effect that it preferred the "evidence" provided by Ms El-Etri to the evidence provided by Mr Ibrahim does not mean that the Tribunal relied on the two emails in their entirety, or more particularly, that it considered that all of the information in the two emails comprised information that would be the reason, or part of the reason, for affirming the decision under review. Mr Ibrahim's submission to the contrary is rejected.

89 89 Finally, Mr Ibrahim's contention that the emails included information which undermined Mr Ibrahim's claim that he was in a genuine relationship with Ms El-Etri, and that that information was not disclosed, is rejected. Mr Ibrahim's submissions in support of that contention appeared to proceed on the erroneous premise that the Tribunal was required, in terms, to disclose verbatim virtually every statement made in the two emails. It is sufficient to give but a few examples of the statements that Mr Ibrahim submitted should have been, but were not, disclosed to demonstrate why the submission has no merit.

90 90 Mr Ibrahim submitted that the Tribunal was required to, but did not, disclose the statement in the first email that "he did a little lie party in photos". That was despite the fact that the particulars that were provided by the Tribunal included that "you [Mr Ibrahim] and [Ms El-Etri] only met on 4-5 occasions and you used these occasions to take photographs of the two of you together". Similarly, Mr Ibrahim submitted that the Tribunal was required to disclose that the first email included the statement "all I love is my husband". That was

despite the fact that the particulars provided by the Tribunal included that “[Ms El-Etri] remained in the relationship with her ex-husband”. Mr Ibrahim also submitted that the Tribunal was required to disclose that the email included the statement “with I was never married to him”, despite the fact that the particulars provided by the Tribunal included that “you’re [sic] [Mr Ibrahim’s] marriage to her [Ms El-Etri] is a fake marriage”.

91 91 Finally, there could be no doubt that the particulars of the information in the two emails that were provided by the Tribunal were sufficient to provide Mr Ibrahim with a real and meaningful opportunity to comment on or and respond to the relevant information. Mr Ibrahim took up that opportunity and provided a relatively detailed response at the hearing. It should also be noted that, prior to the hearing, Mr Ibrahim provided voluminous material to the Tribunal to respond to and refute the information that Ms El-Etri had provided to the Department which had been disclosed to him by the delegate. Mr Ibrahim’s letter to the Tribunal dated 20 September 2016 reveals that he was well aware of the substance of the information that Ms El-Etri had provided to the Department: that his marriage with Ms El-Etri was contrived and that she only married him because he had promised to give her \$30,000. Mr Ibrahim’s response to that information was, amongst other things, to discredit Ms El-Etri and the information that she had provided.

92 92 The apparent suggestion that Mr Ibrahim was denied a real and meaningful opportunity to respond to and comment on the information provided by Ms El-Etri has no merit and is rejected.

93 93 In all the circumstances, there was and is no basis for concluding that the Tribunal did not comply with s 359AA or s 359A of the Act. Mr Ibrahim was given clear particulars of all the information which the Tribunal considered at the time would be the reason, or part of the reason, for affirming the decision under review. Mr Ibrahim has not demonstrated to the contrary. The primary judge was correct to find that the Tribunal did not contravene s 359AA, albeit that his Honour’s reasons for so finding are far from clear or cogent. It follows that ground 1 of the appeal has no merit and is rejected.

GROUND 2 – THE REFERENCES TO “CONCLUSIVE EVIDENCE”

94 94 In stating that it was not satisfied that there was “conclusive evidence” that Mr Ibrahim and Ms El-Etri had established a household together, or that they were in an exclusive relationship with each other, the Tribunal could perhaps be accused of using infelicitous language. The Tribunal could no doubt have expressed its conclusions in that

regard in less controversial terms. On balance, however, a fair reading of the Tribunal's reasons does not support the contention that the Tribunal misunderstood its statutory function and effectively required Mr Ibrahim to prove that he and Ms El-Etri were spouses beyond reasonable doubt.

95 95 Had the Tribunal in fact approached its review jurisdiction on the basis that Mr Ibrahim had the burden or onus of proving that Ms El-Etri was his spouse, or that he had not provided any false and misleading information, it would have been open to conclude that the Tribunal misconstrued its jurisdiction. That is because, as a general proposition, there is no onus or burden of proof in administrative decision-making, including in the Tribunal: *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220 at [14] (per Logan J), [61]-[71] (per Flick and Rangiah JJ) and the cases there cited. There is also no express statutory provision in the Act or the *Administrative Appeals Tribunal Act 1975* (Cth) which imposes any onus or burden of proof on review applicant. Nor is there any basis upon which to imply that the statutory scheme imposed any such onus or burden on the review applicant.

96 96 When the Tribunal's reasons are considered as a whole, and its isolated references to "conclusive evidence" are considered in context, it is tolerably clear that the Tribunal did not approach the review on the basis that Mr Ibrahim had any onus or burden of proof. There are numerous other references in the Tribunal's reasons which suggest that it approached its task on the orthodox basis that it was required to consider and assess the evidence and material before it and thereby establish the relevant facts. For example, the Tribunal considered the evidence relating to the financial aspects of the alleged relationship and found that it was not satisfied that the circumstances indicated that Mr Ibrahim and Ms El-Etri were in a genuine and continuing relationship (Reasons at [71]). Similarly, the Tribunal reasoned that the evidence concerning the social aspects of the relationship did not support a finding that Mr Ibrahim and Ms El-Etri were in an exclusive relationship which was genuine and continuing (Reasons at [84]).

97 97 Even the specific references to "conclusive evidence" do not support the conclusion that the Tribunal considered that Mr Ibrahim bore the onus of proof. Rather, the Tribunal was simply stating, albeit in robust and emphatic terms, that it was not satisfied that the evidence established that Mr Ibrahim and Ms El-Etri were spouses. The use of the word "conclusive" in that context simply meant "convincing" or "decisive".

98 98 It is well accepted that the reasons of administrative decision-makers should not be “construed minutely and finely with an eye keenly attuned to the perception of error” and that the Court should not be “concerned with looseness in the language ... nor with unhappy phrasing” of the reasons of an administrative decision-maker: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272. That is what Mr Ibrahim would have the Court do in relation to the isolated passages in the Tribunal’s reasons which refer to “conclusive evidence”.

99 99 It should also be noted in the context of the second ground of appeal that Mr Ibrahim did not advance any written or oral submissions in support of the contention that the Tribunal’s decision was unreasonable and that the primary judge erred in not so finding. There is also no indication that legal unreasonableness was raised as a separate ground in the Circuit Court. Any reliance on legal unreasonableness as a separate ground of review or appeal may be taken to have been abandoned.

100 100 The primary judge was correct to reject the contention that the Tribunal had misunderstood its statutory function. The second ground of the appeal has no merit and must be dismissed.

CONCLUSION AND DISPOSITION

101 101 Mr Ibrahim has failed to make out either ground of appeal or otherwise demonstrate appellable error on the part of the primary judge. His appeal must accordingly be dismissed with costs.

I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 21 December 2018